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I. INTRODUCTION

A.

Decentralized national government is a distinctively American idea. The major European states were, for the most part, organized from the top down, from the capital outward. Until very recently—the last half of this century—local autonomy, in most of the world, was a sign of national weakness.[1]

The American tradition is very different. Decentralization and federalism have been exceptionally important features of our system from the start. The American economy, and American society and politics, have always been organized around regional centers instead of a single dominant metropolitan city.[2] We are accustomed to thinking of federalism as diminishing in importance today, but even today the states are far from being administrative divisions of the national government. States pursue varying policies on a wide range of important matters.

But there is one aspect of our system that we have never thought of as decentralized. That is the federal judiciary. The federal judiciary is supposed to be a hierarchy of the strictest kind. Commands emanate from the top—from the Supreme Court. The binding commands from the Supreme Court include not just mandates in specific cases but opinions that are generally written in a way designed to provide guidance. It is a lawless act for an inferior judge to refuse to follow Supreme Court precedent.

Of course, until the Supreme Court has spoken, there is considerable scope for regional and even local experimentation by the courts of appeals and the federal district courts, respectively. But the experimentation is supposed to be only temporary. Among the federal courts, prolonged diversity is not a good thing: If there is a conflict among the circuits on any issue of any importance, the Supreme Court is expected to

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1. *See generally* Elazar, *The Role of Federalism in Political Integration*, in FEDERALISM AND POLITICAL INTEGRATION 13 (1979).

2. *See id.* at 35.

intervene before too long and provide authoritative guidance.[3] Then the inferior courts must fall in line. They cannot continue to experiment.[4]

All of this is obvious and familiar. We are accustomed to thinking of the lower courts' hierarchical subordination to the Supreme Court not as an aspect of the bureaucratic organization of the courts so much as a necessary characteristic of the rule of law. The federal judiciary is supposed to enforce federal law, and there is supposed to be only one version of federal law. Of course, there will always be unresolved questions. Often the unresolved questions are difficult, and it is a desirable feature of the system that it provides for some experimentation among circuits or districts. In that way, the Supreme Court can acquire a sense of how different possible rules work in practice. But ultimately—and sooner rather than later—the differences must be resolved, or we will no longer have a single body of federal law.[5]

In this paper I want to suggest that this familiar conception of the federal judicial system is increasingly unrealistic, at least in public law cases challenging large-scale institutions or practices. It has been eroding for some time. Its erosion is a consequence principally of the dramatic increase in the "activism" of federal courts in the last three decades. This "activism" is not only—perhaps not even primarily—the product of the famous Warren Court decisions, although *Brown v. Board of Education*[6] certainly inaugurated the process. It is also the product of the outpouring of federal legislation designed to reform important aspects of society: the Civil Rights Act of 1964, the Voting Rights Act, the Fair Housing Act, the Clean Air Act, the Clean Water Act, and other comparable legislation.

In many respects, major public law litigation is resolved in a way that is not characteristic of a hierarchical judicial system enforcing legal rules of national scope. Instead, these disputes are resolved by a process of bargaining at the local level. The federal judge is a very important participant in the bargaining relationship. But she is not the dictator—or if she is, what she dictates is often not, in any familiar sense, "the law." That is, it is not a principle declared by the superior courts after due deliberation.

In this way, the federal judiciary acts in a fashion that is less like our

3. *See* SUP. CT. R. 17.1(a).

4. *See* R. STERN, E. GRESSMAN & S. SHAPIRO, SUPREME COURT PRACTICE §§ 4.4-.26 (6th ed. 1986).

5. For a more skeptical discussion of the value of uniformity, see Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1250-53 (1978).

6. 347 U.S. 483 (1954).

traditional conception of the courts and more like a flexible, decentralized bureaucracy. To some extent this arrangement can be seen as an attempt to capture the advantages of the decentralized federal system characteristic of other aspects of our government. Federal district judges have considerable autonomy. They can take local circumstances, interests, and pressures into account. Their superiors in the courts of appeals will intervene only in one of two situations: if the district judges have acted in a more or less obviously inappropriate fashion, or if they—the courts of appeals judges—decide, in the exercise of *their* flexible discretion, that the courts should not play a role in the local resolution of the issue.

I do not want to suggest that this is necessarily a deplorable development. For the most part it is an inevitable development. Changes of the kind ordered by the legislation I mentioned, and by the Supreme Court's interpretations of the Constitution, cannot be implemented by direct commands from the center. Local variations are too great and too complex; there must be someone on the scene with power to take them into account.

Perhaps more important—and this is a factor often overlooked in discussions of the changing role of "managerial" judges—is the possibility of local resistance. The conventional understanding of the federal judiciary as a centralized hierarchy assumes that there will be no question that the parties to whom judges' orders are directed will obey them. Throughout most of our history, except in extraordinary times, obedience was not an issue. That changed with the development of legislation and constitutional law that ordered large-scale reform. From the beginning of the era of "activist" and reformist law—the school desegregation controversy—resistance has been a real problem. Indeed, it was never a greater problem than at the beginning, and that may have set the tone for the entire era.[7]

The possibility of resistance, together with the need to take legitimate local variations into account, requires a greater sensitivity to local conditions than a strictly centralized and hierarchical organization can provide. The local judge on the scene, if she has more flexibility, can decide when it may be more productive in the long run not to press too hard in the short run. Whether this is a good thing is, again, a difficult and contingent question; the answer may well vary among substantive

7. On the resistance to *Brown v. Board of Education*, see, *e.g.*, J. BASS, UNLIKELY HEROES (1981); M. BELKNAP, FEDERAL LAW AND SOUTHERN ORDER (1987); McKay, *"With All Deliberate Speed": A Study of School Desegregation*, 31 N.Y.U. L. REV. 991, 1016-66 (1956).

areas. There will be times when the local judge will overreact to local resistance and yield too much. Flexibility on the local level may, in this way, even encourage resistance. Sometimes the knowledge that compliance will inevitably be enforced from the top will be the best way of defeating resistance. But it seems inevitable that, in any system in which resistance is a possibility, there will be a tendency to give flexibility to the person on the scene—in this case, the federal district judge.

Another factor helped produce this situation. That is the ambivalent reaction of the Supreme Court, in the last twenty years, to the reformist legislation and the activist precedents. The Court has not been unrelentingly hostile to either; in some respects it has added its own reformist mandates. But overall, the Court has been somewhat hostile. It has been hesitant and reluctant to expand the newly created rights.[8] This has resulted in a variety of flexible, discretionary doctrines that permit courts to avoid enforcing federal rights against established practices and institutions.[9]

B.

The *Shakman* litigation is an excellent illustration of these points.[10] *Shakman* was a suit challenging patronage practices in Cook County politics. It was brought not by disappointed applicants for patronage jobs but by independent candidates for public office who believed that the patronage practices unconstitutionally thwarted their efforts to be elected. Initially the district court dismissed the complaint on the ground that the plaintiffs lacked standing. The Seventh Circuit reversed. On remand the district court ruled in favor of the plaintiffs. On a second appeal from part of the district court's judgment the court of appeals again reversed. The court decided that a significant part of the suit—the challenge to patronage hiring practices—should be dismissed.

Described in this way, the litigation sounds unremarkable. But consider the following. The suit was brought in 1969. The final court of appeals decision was rendered *eighteen* years later. But the delay hardly mattered anyway; judging from Mr. Johnson's account,[11] the court of appeals' decision was basically beside the point. By the time it was rendered, the Cook County patronage system had already been dismantled, to a significant extent, by consent decrees entered into in connection with

8. *See infra* notes 35-42 and accompanying text.
9. *See id.*
10. *See generally* Shakman v. Democratic Org., 829 F.2d 1387 (7th Cir. 1987).
11. *See* Johnson, *Successful Reform Litigation: The* Shakman *Patronage Case*, 64 CHI-KENT L. REV. 479 (1988) (Mr. Johnson's article appears in this symposium issue).

the suit. As Mr. Johnson says in his title, the *Shakman* litigation was "successful" notwithstanding the defeat in the court of appeals.[12]

There's more. The question raised by the *Shakman* plaintiffs—whether patronage practices violate the constitutional rights of candidates—seems to me to be an unusually difficult question of constitutional law, for reasons I will develop below. It is a substantially different question from whether patronage systems violate the rights of those who are denied jobs because of their lack of political affiliation with the incumbents—the issue addressed in *Elrod v. Burns*.[13]

There is much to be said for the *Shakman* plaintiffs' position, but it is not obviously correct. In many respects the *Shakman* plaintiffs' arguments raise questions that are at the frontiers of first amendment law. In its difficulty and importance the question whether patronage violates the constitutional rights of opposing candidates seems to be a clear Supreme Court issue; the only thing that might keep the Supreme Court from resolving the issue is that the fate of patronage seems likely to be decided, for practical purposes, in suits like *Elrod v. Burns*, in which it is a disappointed job applicant who challenges the patronage practices.[14]

The difficult and important question—whether patronage practices violate the constitutional rights of candidates who challenge those supported by the patronage system—was *the* issue in the *Shakman* litigation. But even though the litigation lasted so long; even though it appears to have reached a conclusion, more or less; even though two district judges and two court of appeals panels rendered decisions; even though, to judge from Mr. Johnson's account, the suit was responsible for significantly diminishing the patronage system in Cook County; we still do not have a resolution of that question. It was squarely addressed by only one district judge. The first district court decision addressed only standing. The first court of appeals' decision was notably delphic; although it appeared to go beyond standing and address the merits, it did so in a very conclusory way, and by common agreement it did not resolve the question whether patronage hiring, as opposed to discharges, violated the constitutional rights of candidates who opposed the Democratic Party establishment. The second court of appeals decision purported to address only the question of standing. Under the law of the Seventh Cir-

12. *Id.*

13. 427 U.S. 347 (1976).

14. The Supreme Court declined to review the first court of appeals decision in the *Shakman* litigation. Shakman v. Democratic Org., 435 F.2d 267 (7th Cir. 1970), *cert. denied*, 402 U.S. 909 (1971). But at that time the case was in an interlocutory posture, a fact emphasized by the Brief in Opposition filed by Mr. Johnson and the plaintiffs' other attorneys. *See* Brief for Respondents in Opposition at 7.

cuit, does a patronage hiring system violate the rights of candidates competing with the incumbent party? After eighteen years of the *Shakman* litigation, apparently resulting in the partial dismantling of the patronage in Chicago and Cook County, we still do not know.

The outcome of the *Shakman* litigation to date may be a good thing or a bad thing. But one thing it does not seem to be is the product of the law as we traditionally conceive it. It is more nearly the product of the kind of decentralized, quasi-bureaucratic system I described above. This was not a case in which the legal issue reached the highest court that was needed to resolve it, and that court's decision was then implemented. The highest court to address the case never resolved the hiring issue on the merits, resolved the other merits issues in an obscure way, and ultimately decided the case on the basis of standing. And although the court decided against the plaintiffs, they apparently got most of what they wanted out of the case anyway. In the rest of this paper, I will try to identify the elements of the system that produced this result.

II. THE CONSTITUTIONAL ISSUE IN *SHAKMAN*

The logical place to begin is with the substantive issue in *Shakman*. The *Shakman* plaintiffs were an independent candidate for office and voters who supported him. In 1969, they brought a wide-ranging challenge to patronage in Chicago and Cook County. They claimed—and apparently no one seriously denies—that various units of local government, dominated by the Democratic Party, hired people because they had done work to aid the electoral fortunes of the party and retained them on the condition that they continue to do such work. The plaintiffs alleged that this put them at a great disadvantage in seeking office—a disadvantage that the Constitution does not permit. In particular, they claimed that the patronage system deprived them of rights to freedom of speech, to equal access to the electoral process, and to be free from government discrimination on grounds of political beliefs.

I am not at all inclined to defend the patronage system Mr. Johnson describes on policy grounds. But the constitutional issue is by no means easy. The problem is to distinguish patronage from the many things incumbents legitimately do in their efforts to stay in office. Judge Bua, the only judge who squarely discussed the merits, ruled that the patronage system was constitutionally suspect because "[t]he defendants have freely admitted that 'one of the purposes of giving the preference in hiring' is to 'help . . . elect candidates supported by the various members of the Dem-

ocratic County Central Committee.' "[15] But incumbents constantly use government resources for the purpose of helping elect themselves, and those they support.

Consider the following example, which I am sure is not hypothetical. A certain union (or it can be an employer's group or any organization) decides to support a candidate for public office. Union officials make speeches endorsing the candidate and urging people to vote for her. Union members help circulate the candidate's literature, register voters, canvass, transport likely supporters to the polls on election day, and so on.

The candidate wins. A bill is proposed that is of especially great interest to the union that supported her. Suppose, for example, that it is an occupational health measure that will control a health hazard present exclusively in the industry that the union has organized. The candidate (now an elected official) does not slavishly follow the union. But she considers the union's views more carefully than she would have if they had supported her opponent, and she is more inclined to vote in the way the union wants her to vote than she would be if they had supported her opponent. The result of her attention to the union's interests, of course, is that the union is likely to support her, and work for her, in the next election; and the result of that is that any challenger she faces will be at a significant electoral disadvantage.

This does not seem to be a dishonorable way for the official to act. It might even be a desirable way for the official to act; it might be said to be democracy in action. Voters should support candidates who they think will perform in office in a way of which they approve; that is the point of popular sovereignty. If the candidate wins office, she should respond to those constituents; that is part of an official's responsibility in a democracy. I doubt that anyone would say, in my example, that when the official was receptive to the union she abridged the constitutional rights of prospective opponents by encouraging the union to continue to support her, and work for her.

But it is not easy to identify an analytically significant difference between this case and *Shakman*. In both cases the incumbent has control over some government resource—jobs or the benefits conferred by the bill. In both cases the incumbent is using that control in a way that benefits supporters because they were supporters. In both cases part of the incumbent's intention is (as incumbents' intentions will be) to get

15. Shakman v. Democratic Org., 481 F. Supp. 1315, 1344 (N.D. Ill. 1979) (ellipsis in original).

reelected. In both cases the supporters provided tangible services to help the incumbent.

In both cases the supporters have the option of ending their support of the incumbent and throwing in their lot with another; but if they do so they can expect to lose the benefit (jobs or legislation) they receive as a result of their support of the incumbent. In both cases the effect will be to make it more difficult to unseat the incumbent.

There is a difference of degree, of course. An army of patronage workers who depend on the incumbent for their livelihood will be much more effective than a union that is seeking only a limited category of benefits from the incumbent. But often incumbents will have many relationships like the one I described between the official and the union; the cumulative effect of those relationships might easily make the incumbent all but invulnerable. The extraordinary reelection rate of members of Congress in recent years may be the result of such networks of relationships with supporters.[16]

In any event, as I understand the position of the *Shakman* plaintiffs and Judge Bua, it was not a necessary premise of their argument against patronage that the system was effective. Judge Bua's opinion is explicit on this point:

> This is not to say, of course, that patronage workers are the dominant force in every election. The plaintiffs do not claim that they are. The parties agree that many factors, including campaign money, television exposure, racial or ethnic background, etc., may influence the outcome of the election. The point is that patronage workers give an important advantage to regular Democrats. The regular Democratic defendants are using the government to further their own political interests by giving preferences for many government jobs only to those who have worked and/or will promise to work for regular Democratic candidates.[17]

This passage, *mutatis mutandis*, describes the official in my example as well. Instead of giving "preferences for many government jobs," she gives preferential treatment to the union's concerns. While she may not extract an explicit promise of future support from the union, she would certainly stop being so receptive if she ever thought that the union had decided to support her opponent in the next election.

One possible answer is to say that I was too quick in assuming that

16. On the reelection rates of members of the House of Representatives, see 1986 Cong. Q. Almanac 36. For general discussion, see, *e.g.*, M. FIORINA, CONGRESS: KEYSTONE OF THE WASHINGTON ESTABLISHMENT (1977); G. JACOBSEN, THE POLITICS OF CONGRESSIONAL ELECTIONS (2d ed. 1987).

17. *Shakman*, 481 F. Supp. at 1355.

the official in my example was acting properly. It is impermissible, one might argue, for an official to discriminate between supporters and opponents, except perhaps in certain limited ways, such as appointments to high-level positions. Once the election is over, the argument would go, the winner stops being a candidate and becomes a trustee for every member of the public, supporter or opponent.

So in my example, the argument would continue, the official really has acted improperly. Her improper action takes such a subtle form—simply listening more carefully to her supporters than to others—that obviously it will never give rise to a successful lawsuit. But the fact remains, according to this argument, that the official has acted wrongly and should conduct herself differently in office. She can differentiate among her constituents on many bases: some will be more needy, some more deserving, some able to make more of a contribution to society, and so on. But she cannot discriminate on the basis of political views, or prior support for her candidacy, any more than she can discriminate on the basis of religion or race.

This is an appealing view. There are substantial hints of it in Judge Bua's opinion, although he does not spell it out fully. In some form it may be the correct view. But there are, I believe, at least two difficulties with it.

First, it seems to declare much of what we consider perfectly normal politics off limits. Politicians are constantly helping their supporters. Every time they do so, their actions are difficult to distinguish from patronage. Suppose, for example, that the President wants Congress to enact a civil rights bill. Senator Mugwump is inclined to favor the bill but her constituents break down as follows: a substantial minority is very (and vocally) hostile to it; a smaller minority is quietly in favor of it; and the rest don't care.

The Senator is unsure whether to vote for the bill, since it will jeopardize her chances of being reelected. The President, aware of her predicament, instructs the Army Corps of Engineers to build a dam in her state. Assume that her state is one of several possible locations for the dam, all of which are roughly equally suitable. The dam project brings jobs to the Senator's state, and her constituents give her the credit for it. The effect of the President's action is, therefore, that the apathetic mass now supports the Senator and her reelection chances are greatly enhanced. She now feels safe enough in her seat to vote her conscience, in favor of the civil rights bill.

It would be very surprising if this kind of politics was unconstitu-

tional, or even improper. But if the logic of Judge Bua's opinion in *Shakman* were to prevail, it would be hard to escape the conclusion that such an action would be unconstitutional. A prospective opponent of the Senator who was planning to run against her on an anti-civil rights platform is in the same position as the *Shakman* plaintiffs. He will complain that the Senator and the President have used government resources to make it all but impossible for him to win. The voters know what will happen if they elect him instead of reelecting the Senator—no more dams, that's what will happen. The patronage employees in Cook County will lose their jobs; the voters in this state will lose their dam. If anything the President's action in my hypothetical is worse, because the payoff goes directly to the voters.

The more general way of stating this problem is that it is integral to the fabric of a democracy in many ways that office holders will discriminate in favor of their supporters. A candidate runs for office (in the ideal world) by promising to do certain things if elected. The voters who want those things done will vote for her. The voters who want inconsistent things done will vote against her. If she wins, in a well-functioning democracy, she will do what she promised to do. Her supporters will get what they want; her opponents will not get what they want. Should it matter whether she promises a cleaner environment (which her supporters want but which will impose costs on her opponents) instead of jobs to specific individuals?

Instinctively one wants to say that of course it matters. I do not want to suggest, with these examples and arguments, that the *Shakman* plaintiffs' position is necessarily wrong. At some point the incumbents' efforts to help themselves through the tactically advantageous distribution of government resources has to become impermissible. The consequences of allowing the incumbents to do whatever they want could be truly unspeakable. The resources of the government are just too great to give anyone free rein. There is no question that the democratic process could be corrupted if incumbents are allowed to use all the massive resources of the government to entrench themselves. And at some point the use of government resources to aid the incumbent becomes a betrayal of both those who supply those resources—the taxpayers—and those who are dependent on them, or those who have a legitimate claim that is frustrated because the resources have been diverted for political reasons.

Employment may be a good place to draw the line.[18] Jobs are im-

18. It might be argued that employment is different from the other examples I have given for the following reason: building a dam, or enacting an occupational safety law, at least serves some

portant to people; that heightens the danger of abuse. Also, it is generally not that difficult to determine when a government official is awarding a person a job for reasons that have nothing to do with the public interest. There will be many intermediate cases, where a person who is qualified but not necessarily the best receives special consideration because of his or her political activities. But where there is gross abuse it will be easy to identify. So despite its conceptual difficulties, there is much to be said for the *Shakman* plaintiffs' position. That position is not, however, obviously correct on the merits. It raises tricky and interesting issues about the obligations of government officials in a representative democracy and about the extent to which an elected official acts improperly by doing precisely that which, in some senses, she is supposed to do—use government resources in a way that will satisfy enough constituents to bring about her reelection.

III. *SHAKMAN* AND THE TRADITIONAL RULE OF LAW MODEL

When a party to a lawsuit raises a difficult issue of federal constitutional law, one expects something like the following to happen. There are proceedings in the trial court, probably on summary judgment or a motion to dismiss, since the legal issue is difficult and the court will want to resolve it without factual complications, if possible. Then the state supreme court or the United States court of appeals will have a crack at the issue. If the issue is both difficult and important, it may well find its way to the United States Supreme Court. In any event there will be a definitive appellate resolution. If the plaintiffs win, the case will be re-

plausible public purpose. It responds to some conception of what the public interest requires. What public interest can possibly be served by awarding government jobs on a political basis?

This may indeed be a way of distinguishing the cases, but there are several problems with it. First, in my examples, the *actual* reason for the actions taken by the representative—supporting the legislation, building the dam—was in fact to gain (or preserve) support from votes. Nonetheless, these actions seem quite consistent with democratic government as we understand it. If the actions were in fact taken for that purpose, why should they be treated differently from patronage hiring and firing just because my hypothetical actions, perhaps unlike patronage, can also conceivably be done for a different, more public-interested purpose?

Second, it is not clear that patronage hiring in fact serves no public purpose. The Supreme Court has recognized that at the higher levels of government, maintaining a unity of political purpose is not only a legitimate interest but an interest important enough to outweigh the rights of disappointed applicants. *See* Branti v. Finkel, 445 U.S. 507, 517 (1980); Elrod v. Burns, 427 U.S. 347, 367 (1976) (Brennan, J.). Although it is weaker, the same interest exists at lower levels. It is "outweighed" by the constitutional rights of disappointed job-seekers, *Elrod*, 427 U.S. at 365-66, but it is still a legitimate interest.

Finally, this line of argument does not explain why a patronage system violates the rights of competing *candidates* any more than the other political actions I have described. It suggests instead that the problem with the patronage system is its effects on the taxpayers.

turned to the trial court. If the plaintiffs then make the necessary factual showings, that court will order relief.

As I said, this didn't happen in *Shakman*. Why not? There are, I believe, two principal and complementary explanations: the expanding role of the federal district judge, and the development, principally by the Supreme Court, of doctrines that facilitate the kind of resolution that appears to have occurred in *Shakman*.

A.

The expansion of the role of the federal district judge is a familiar theme. Federal district judges have adopted an increasingly "managerial" role, especially in large public law cases. They are no longer like referees; they are much more active in promoting settlement and shaping the resolution of the litigation.[19]

This is the role that seems to me distinctively non-legal—lawless, but not necessarily in a pejorative sense of that word. Much of what a "managerial" judge does is not subject to appellate review.[20] Moreover, it is accepted that judges in such cases do not simply apply abstract principles. Indeed, the idea is that many of the problems that are encountered in large-scale public law litigation cannot be resolved in this way. They require more discretion and more flexibility; the kinds of things the judge does cannot be captured in rules. Necessarily the district judge in these cases must do more than simply apply legal principles.[21]

In addition, this new understanding of the dynamics of public law litigation emphasizes the role of the parties in negotiating a comprehensive settlement. The *Shakman* consent decrees are an especially dramatic example. The outcome of the *Shakman* litigation was the product, not of the application of "the law," but of the negotiations between the parties. Of course, legal principles played a key role in the background. But that is the point: in the strict "rule of law" model, the legal considerations are supposed to be the whole story. Instead, in *Shakman*, they were just part of the story. The negotiating strength of the parties—in particular, the internal political dynamics of the government defendants—were also important.[22] And so were the views of the particular

19. *See* Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976); Resnik, *Managerial Judges*, 96 HARV. L. REV. 376 (1982). For the view that this is not a new role, see Eisenberg & Yeazell, *The Ordinary and the Extraordinary in Institutional Litigation*, 93 HARV. L. REV. 465 (1980). *See also* D. HOROWITZ, THE COURTS AND SOCIAL POLICY (1977).

20. *See* Resnik, *supra* note 19, at 433 (urging that managerial decision should be made appealable).

21. *See* Chayes, *supra* note 19.

22. *See* Johnson, *supra* note 11, at 484-86.

district judge, for recall that the negotiations were conducted against a background of minimal guidance from the court of appeals' elliptical first opinion.

Shakman suggests another interesting role for the law that is quite different from the role that it plays in the traditional rule of law model. As Mr. Johnson's essay notes, the period during which the *Shakman* litigation proceeded saw significant changes in Chicago politics.[23] It seems likely that among the government defendants, there was a change from leadership that was resolutely committed to defending the patronage system to leadership that was willing, perhaps even eager, to dispense with patronage. Or in any event, there might have been divisions within some of the institutional defendants; within particular units of government, some officials might have wanted to preserve patronage while others were looking for a way to be rid of it. The relatively ready acquiescence that Mr. Johnson reports (in some cases) suggests that there is a good chance that such anti-patronage sentiments within the government defendants were at best fairly strong.

Such divisions within government entities, or changes in the views held by officials, will probably not be uncommon. Government defendants, unlike individual defendants, are far from monolithic. To some extent they will reflect the varying political tendencies found in the community. If a government defendant is sued by a party claiming a serious, systemic constitutional violation, and the claim, whether right or not, is at least substantial, one can expect that in many cases there will be people within the government who are sympathetic to the claim. These people may be looking for an opportunity to change the policy of the government defendant in the ways urged by the claimants.[24]

In these cases, the effect of "the law"—which will, as I noted, often be little more than the district judge's view—will be to change the balance of power within the unit of government the actions of which have been challenged in the suit. Those within the government who advocate reform did not have the power to accomplish their objective before the lawsuit was brought; but the district judge's decision—in some cases, the mere fact that the suit was brought—will enhance their power and may enable their view to prevail. They will now be able to say that in addition to the arguments for reform that they had made all along, there is now an additional reason: failure to implement the reform can only bring

23. Johnson, *supra* note 11, at 493-94.

24. *See* Shane, *Rights, Remedies and Restraints*, 64 CHI.-KENT L. REV. 531, 558 (1988) (Professor Shane's article appears in this symposium issue).

prolonged and expensive litigation that the government is likely to lose. If the cost of attorneys' fees can be shifted to the government, that is another strong argument that can be used by those within the government who favor the reform.

In many ways this is good. Governments should be more sensitive to the legality of their actions; they should be more willing to consider the possibility that their actions are illegal, and change voluntarily, than they are now. But in the situation I have described, the legality of the government's action will not be the sole determinant of whether the government will change. Mr. Johnson's account makes it clear that the legality was not decisive in *Shakman*; now that the Seventh Circuit has rendered its second decision, there is no valid legal determination that patronage hiring practices violate the constitutional rights of individuals in the position of the *Shakman* plaintiffs.[25] But Mr. Johnson explains that patronage hiring practices have been dismantled anyway, to a significant degree.[26] In general, whether the government defendant gives in and settles on terms favorable to the claimants will depend on the balance of power within the institutional government defendant. "The law," traditionally conceived, will be just one factor influencing this balance.

What should one think of these departures from the conventional understanding of how a legal system operates? Are they justifiable? Those who believe, on substantive or procedural grounds, that the courts should not engage in large-scale reform, will find that an easy question; the fact that such departures occur is just another reason for the courts to stay out of the reform business. But if one wants the courts to have the capacity to engage in large-scale reform, these departures, however undesirable in the abstract, seem unavoidable. Suppose you were an emperor, determined to bring about changes of the kind that the Supreme Court has ordered in the last thirty years. (As I said before, this includes not just constitutional decisions by the Court but the implementation of statutes enacted by Congress.) It would be folly to try to do so without establishing some kind of decentralized bureaucracy and delegating some authority. There will be local circumstances that you, the emperor, cannot fully understand. There will be local opposition to be taken into account. One of your minions, on the scene, will have a sense of the relative strength of the various local actors. She will know, for example, if a reform faction opposed to patronage has recently gained power

25. *See* Johnson, *supra* note 11, at 494-96.
26. *Id.* at 492-93.

within one of the units of government that you are seeking to change (at least she is more likely to know that than the emperor is), and in implementing your mandate she can act accordingly.

Notice that you will have to give your agents a significant amount of autonomy. You cannot expect them simply to apply strict rules that you lay down. In fact it is a mistake to expect the system to run by strict rules. You are going to have to accept the fact that from time to time your delegates will do things that seem wrong to you. They may compromise or delay in ways of which you disapprove. They may interpret your general mandates in ways that you did not intend. But you are just going to have to live with that, because it would be disastrous for you to try to administer the program by means of rigid rules promulgated from the capital and applied in an essentially ministerial way.

When the federal courts' principal preoccupation was with such tasks as elaborating rules to govern commercial transactions, this model did not apply.[27] It is reasonable to try to propound such rules from the top (after suitable experimentation in local areas) and to expect faithful adherence. Similarly, under the tradition of highly deferential review, the federal courts would not have to be decentralized in this sense. Under that tradition, the courts would mostly let the political branches have their way. They would intervene only to correct irrational and aberrational actions.[28] But if an act is irrational and aberrational, it will not be either necessary or desirable to have flexibility on the local level. One will simply want to overturn the act, and there is no reason to expect widespread or prolonged opposition.

If, however, you are trying to overturn Jim Crow, or force a city to build public housing, or eliminate patronage, that is a different matter, and local flexibility is needed. In the ways I have described, that local flexibility is inconsistent with the rule of law as it is traditionally conceived.

B.

The second element that helps bring about this flexible, decentralized, fundamentally non-legal way of resolving disputes is various doctrines propounded by the Supreme Court itself. These doctrines seem to me to be a response—conscious in some cases, probably not conscious in

27. *See, e.g.*, Swift v. Tyson, 41 U.S. 1 (1842).

28. *See, e.g.*, Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 144 (1893) (courts should invalidate statutes only "when those who have the right to make laws have not merely made a mistake, but have made a very clear one,—so clear that it is not open to rational question").

others—to the fact that the courts are now performing tasks that cannot be accomplished in a centralized, strictly legal way.

The current doctrine of standing, which was decisive in the most recent stage of *Shakman*, is a principal example.[29] To my eye, at least, two aspects of the second court of appeals' decision seem peculiar. First, the decision purports to be about standing, not about the merits. But it is kind of about the merits, too. The court does not explicitly decide whether persons like the *Shakman* plaintiffs have a constitutional right not to have to compete with incumbents who are backed by a patronage system. But many of its arguments have the flavor of holding that they do not have such a right.

The second odd aspect of the court of appeals' opinion is its speculative character. The court pointed out that whether the patronage system in fact impairs the electoral chances of the *Shakman* plaintiffs "depends upon countless individual decisions . . . [which in turn] depend upon . . . countless individual political assessments that those who are in power will stay in power."[30] The court reasoned, in essence, that if enough job-seekers decide that the Democratic Party will lose the next election, they will not work for it, and their prophecy will prove self-fulfilling.

That reasoning is correct enough, as far as it goes. But why does it follow that the plaintiffs lose? What if the plaintiffs could show, as a matter of fact, that job-seekers are more likely than not to continue to support the incumbents? Won't they then have made out their case by a preponderance of the evidence? Such a showing, by the way, should not be that difficult for the plaintiffs to make; the court of appeals' hint that job-seekers are no more likely to support the incumbents than to oppose them seems inconsistent with common sense. There is a so-called collective action problem:[31] if the job-seekers could get together, they might agree all to leave the Democratic Party at once and throw their support to the *Shakman* plaintiffs or some other group of challengers. But of course they cannot, realistically, all get together. And from the point of view of any one individual job-seeker (or any small group), it is irrational to refuse to go along with the Democrats in the absence of any assurance that a large number of others will do the same.

Why, then, did the court of appeals conclude that the plaintiffs had to lose just because of the possibility that the patronage system might not insulate the Democrats from electoral challenge? The court might have

29. Shakman v. Dunne, 829 F.2d 1387 (7th Cir. 1987), *cert. denied*, 108 S. Ct. 1026 (1988).

30. *Id.* at 1397.

31. The classic discussion of the collective action problem is M. OLSON, THE LOGIC OF COLLECTIVE ACTION (1965).

concluded that that is the nature of the constitutional right. It might have considered the relevant cases and other sources of law, the kinds of hypotheticals I discussed in Part II, and other relevant considerations, and decided that the best interpretation of the first and fourteenth amendments is that they forbid incumbents only from making their continuation in office a near certainty. Such a "near certainty" rule is not a very appealing interpretation of the Constitution, but at least if that had been the basis of the decision it would have been clear what the court of appeals was doing.

But the court of appeals did not do that. It purported to decide only standing, not the merits. So why did the plaintiffs lose? So far as one can tell from the opinion, the answer is that the court of appeals just thought this was not the kind of issue in which courts should be involved. The key passage of the opinion is:

> It is no easier to measure the effect of an incumbent's promises on the ebb and flow of the political tide in Cook County, Illinois than it is in any other political context.
>
> A plaintiff cannot assert injury to his viability as a candidate or his influence as a voter simply on the basis of the advantage—real or imagined—of incumbency. Such a course would require that we resolve "profound questions of political science that exceed judicial competence to answer . . . ." *LaFalce v. Houston*, 712 F.2d 292, 294 (7th Cir. 1983), *cert. denied*, 464 U.S. 1044 (1984). Tracing the appellees' asserted injury to the appellants' activity . . . must depend on more than the attempt of a federal court to take the political temperature of the body politic.[32]

This reasoning seems to me to be cut from the same non-legal cloth that I have been discussing; and here I am inclined to use the term lawless in a pejorative sense. It would be one thing to conclude that the plaintiffs had no constitutional right to the kind of balance of political forces that they seek. As I said in Part II, that is a plausible position. It might even be acceptable to conclude that the Constitution confides to the political branches, not the courts, the question of how far the incumbents can go in using government resources in a way that insulates them from challenge. That is certainly a questionable view: if the political process is blocked by the incumbents it is difficult to see why that process should be trusted to determine the extent of the incumbents' power.[33]

32. *Shakman*, 829 F.2d at 1398.

33. This view would, therefore, be directly contrary to the dictates of the *Carolene Products* footnote, United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938) (suggesting that "legislation that restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation").

But at least it is an interpretation of the relevant constitutional provisions. And of course the courts can take evidentiary difficulties into account in defining the presumptions that will best implement constitutional values.[34] But the court of appeals in *Shakman* appears to have ordered part of the plaintiffs' claim dismissed not because it was barred by the Constitution but just because that aspect of the claim raised difficult empirical or factual questions.

I do not think the court of appeals is principally to blame, however. The problem lies in one of the foundations of standing doctrine—the Court's statement in *Association of Data Processing Service Organizations v. Camp*[35] that standing is a different question from the merits of a case.[36] In a case like *Shakman*, why shouldn't the courts simply proceed directly to the merits—whether patronage practices violate the constitutional rights of persons like the *Shakman* plaintiffs? Those rights are different from the rights of rejected or discharged job-seekers. So it does make a difference who has brought the lawsuit. But there is no need to see this as a question of "standing." It is a question of whether the plaintiffs' constitutional rights have been violated. A strong argument can be made that if we are interested in applying the law, we should insist that courts answer that question, yes or no, instead of hiding behind "standing."[37]

This problem has been compounded by a more recent development in the law of standing—the "causal connection" principle on which the court of appeals specifically relied. This requirement, a creation of *Simon v. Eastern Kentucky Welfare Rights Organization*,[38] demands that a "plaintiff . . . allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief."[39] Again, there is nothing wrong with requiring a plaintiff to show causation. That has been a standard, perhaps invariant, requirement under the common law for a long time. The problem is with treating causation as a threshold requirement that is to be considered independently of the merits. That approach just invites appellate courts to speculate about facts, much as the court of appeals speculated in this case.[40]

34. *See* Strauss, *The Ubiquity of Prophylactic Rules*, 55 U. CHI. L. REV. 190 (1988).

35. 397 U.S. 150 (1970).

36. *Id.* at 153 ("The 'legal interest' test goes to the merits. The question of standing is different.").

37. *See* Currie, *Misunderstanding Standing*, 1981 SUP. CT. REV. 41; *see also* Albert, *Standing to Challenge Administrative Action: An Inadequate Surrogate for Claim for Relief*, 83 YALE L.J. 425 (1974).

38. 426 U.S. 26, 41-42 (1976).

39. Allen v. Wright, 468 U.S. 737, 751 (1984).

40. For a criticism of this and other recent trends in the law of standing, see generally Sunstein,

The consequence of these two doctrinal developments is that current standing law effectively gives a court of appeals (or a district court, or even the Supreme Court) a reservoir of discretionary power on which it can draw to avoid constitutional issues that it would just rather not decide. This development can be understood in the same way as the expansion of district courts' power that I discussed earlier. Public law cases these days can be difficult, sensitive matters. They can require substantial intrusion by the courts into the autonomy of the political branches. Courts risk being ineffective, or incurring vehement opposition, if they simply adhere to established legal principles. They have to have a greater degree of flexibility, in order to avoid these dangers. Standing doctrine gives courts a way to back off even when the underlying constitutional principles would enjoin them to go ahead.[41]

In these ways, Mr. Johnson's account dovetails with Professor Shane's fine article.[42] Professor Shane is right on the money when he points out the oddity that many of those who purport to read the Constitution strictly and literally persist in acting as if there were a phantom constitutional provision saying something to the effect of: "In case of doubt, interpret this document in a way that upholds the decision of the political majority." If one is to adhere to the rule of law, one must follow the Constitution wherever it leads, and there is no a priori reason to doubt that it will often lead in "activist" or reformist directions.

But as Mr. Johnson's discussion of *Shakman* illustrates, the relationship between the rule of law and an activist or reformist judiciary remains uneasy. Large-scale reforms may very well be impossible to achieve without the kind of free-wheeling, discretionary activity at the district court level that Mr. Johnson describes. On the other hand, the response of those who are uncomfortable with judicial "activism" is to develop doctrines that allow courts the flexibility to retreat from the rule of law and escape the strict mandates of provisions that would require large-scale reform. In the battle over how "reformist" or "activist" the judiciary is to be, the rule of law is neither a necessary casualty nor an unvarying ally of one or the other side. It is more nearly part of the strategic territory that each side seeks to capture.

Standing and the Privitization of Public Law, 88 COLUM. L. REV. 1432 (1988); *see also* Nichol, *Abusing Standing: A Comment on* Allen v. Wright, 133 U. PA. L. REV. 635 (1985).

41. The classic statement of the view that it is good for courts to have flexibility of this kind is A. BICKEL, THE LEAST DANGEROUS BRANCH (1962). For criticism, see Gunther, *The Subtle Vices of the "Passive Virtues"—A Comment on Principle and Expediency in Judicial Review*, 64 COLUM. L. REV. 1 (1964).

42. Shane, *supra* note 24.